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IN THE

# Supreme Court of the United States

October Term, 1957

No. 441

MORTON SOBELL,

*Petitioner,*

v.

UNITED STATES OF AMERICA.

## PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APEALS FOR THE SECOND CIRCUIT

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## PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Petitioner prays for a writ of certiorari to review a judgment of the United States Court of Appeals for the Second Circuit which affirmed an order of the United States District Court for the Southern District of New York, denying a motion for a hearing pursuant to Title 28, U. S. C., Section 2255.

### Opinions Below

The opinion of the district court denying petitioner's motions for hearings * pursuant to Title 28, U. S. C., Section 2255 is reported at 142 F. Supp. 515 and appears in

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* Petitioner instituted two proceedings for hearings pursuant to Title 28, U. S. C., Section 2255. The first motion, filed on May 8, 1956, is the subject of the petition for writ of certiorari filed herewith. This petition relates to the second motion for a hearing made on May 25, 1956.

the record at A. 197.* The opinion of the court below is reported at 244 F. 2d 520, and is attached to the companion petition as Appendix II.

## Jurisdiction

The judgment of the Court of Appeals was entered on May 14, 1957 (Appendix I to companion petition). A petition for rehearing was denied on June 3, 1957. On August 28, 1957, the time for filing petitions for writ of certiorari herein was extended to and including September 10, 1957, by order of Mr. Justice Harlan. The jurisdiction of this Court is invoked pursuant to the provisions of Title 28, U. S. C., Section 1254(1).

## Questions Presented

1. Whether the seizure of petitioner in the territory of the Republic of Mexico by agents of the United States Government without the consent of the Government of Mexico and the subsequent trial of petitioner in disregard of the provisions of the existing Treaty of Extradition, constitute a violation of the treaty.

2. Whether such conduct in disregard of the Treaty of Extradition by the United States deprived the United States Government and consequently its courts of any power to try petitioner and to impose sentence.

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* We designate with the letter "A" references to the current record on appeal. The printed record of the original trial is referred to as "R". We shall refer also to certain appendices designated by Roman numerals attached to the companion petition for writ of certiorari filed simultaneously with this petition. In addition, photostatic copies of the exhibits and Appendices A to D attached to the motion of May 8, 1956 have been filed with the Court.

3. Whether the fundamental lack of jurisdiction in the United States to proceed in the face of a violation of a binding Treaty of Extradition renders a sentence subject to attack under Title 28, U. S. C., Section 2255.

4. Whether it was error for the district court to deny petitioner a hearing on this motion pursuant to Title 28, U. S. C., Section 2255, seeking to vacate the judgment of conviction in that the trial court lacked total jurisdiction to proceed as a result of the violation by the United States of the binding Treaty of Extradition with the Republic of Mexico.

## Treaties and Laws Involved

### a. Statute Involved

Title 28, U. S. C., Section 2255 is reprinted in the companion petition at p. 4.

### b. Treaty Involved

The treaty of extradition between the United States and Mexico presently in force was concluded in 1899 and supplemented in 1902, 1925 and 1939. 31 Stat. 1818.

Article II of the treaty limits the criminal jurisdiction of the contracting parties, in the case of alleged fugitives found in each other's territory, to certain enumerated offenses. These do not include the crime with which petitioner was charged. Article III bars proceedings for offenses of a political character. Article VIII sets forth the steps to be followed in requesting the surrender of fugitives and the documents that are to accompany each request. The article further provides that upon fulfillment of these requirements, the fugitive be brought before the proper

judicial authority for a decision as to the propriety of the extradition in accordance with the law and the evidence.*

### c. The Applicable Laws of Mexico

The Mexican laws relevant to the surrender of persons charged with the commission of crime in the United States are the Constitution of the United States of Mexico and the Law on Extradition of Mexico.**

## Statement of the Case

The history of the prior and present proceedings in this case is set forth in the companion petition for writ of certiorari at pages 5-7. The facts upon which the present petition rests are essentially those in the motion of May 8, 1956 (A. 7 *et seq.*), which are discussed in the companion petition for writ of certiorari.

In the record brought up by this petition there is no denial of any of petitioner's factual allegations. Accordingly, for the purpose of determining whether a hearing should have been granted, the facts alleged in the motion will be deemed to be true. *Chessman* v. *Teets*, 350 U. S. 3, 4.

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* The full texts of Articles II, VIII and XII, and the relevant portions of Articles III and VII are printed in the appendix to this petition. See also, Convention between the United States of America and other American Republics, signed at Montevideo, December 26, 1933. U. S. Treaty Series No. 882.

** The relevant portions of the Constitution of Mexico and the Law on Extradition are set forth in Appendices A and C attached to the motion of May 8, 1956. A summary of these provisions is printed in the appendix to this petition.

We summarize here the basic allegations supporting the present motion for a hearing (A. 78 *et seq.*).

The unlawful abduction of petitioner from the sovereign territory of Mexico by agents and representatives of the United States Government and his subsequent prosecution in the United States were in total violation of the provisions of the treaty of extradition of 1899 between the United States of America and Mexico (31 Stat. 1818). The United States did not follow any of the requirements of the treaty to seek petitioner's extradition by the Government of Mexico. Consequently, petitioner was deprived of a hearing on probable guilt and judicial and executive review in Mexico, as prescribed by the treaty and the Mexican law on extradition. Finally, the United States proceeded against petitioner in a domestic court upon a crime for which the treaty precludes removal and prosecution.

The Government of Mexico in no way consented to this violation of its sovereignty and of the binding treaty of extradition. It in no way participated in petitioner's seizure. It neither deported nor expelled petitioner. And directly upon hearing of the abduction, it protested the transgression against the treaty and Mexican sovereignty to agents of the United States and of the prosecution.

## Reasons for Granting the Writ

### I. The failure to grant petitioner a hearing on his allegations that the trial court was without jurisdiction violates due process of law.

Petitioner's right to the relief sought in his supplemental motion filed pursuant to Title 28, U. S. C., Section 2255 rests upon two contentions. The first is that the treaty of extradition between the United States and Mexico

constitutes an exclusive procedure for the rendition by Mexico of fugitives from the criminal process of the United States. The treaty commits both governments to resort only to its provisions. The second is that the seizure of petitioner by agents of the United States violates the treaty and for that reason deprived the United States of national and consequently judicial power to try petitioner or to impose sentence.

These two contentions are juridically linked by the fact that the treaty—like all treaties of this sort—safeguards the principles of territorial limitations upon the sovereign power of the demanding state and of the territorial inviolability of the sovereignty of the asylum state. The treaty creates a means of expanding the former without infringing upon the latter, through assent and collaboration in a specific manner and class of cases. The basis for the assent and collaboration and its juridical precondition is thus not only the plenary sovereign power of the asylum state but the lack of national power of the demanding state to function extraterritorially.

The extradition treaty is an exclusive means of dealing with the problem which it covers for the simple reason that there is an absence of power to proceed without it. A resort to self-help is not only a violation of the treaty in a particular instance, but a repudiation of the basic concept of national sovereignty which the treaty is designed to protect and fortify. The denial by the lower courts of petitioner's motion flows from a serious misconception of the scope and nature of the treaty involved here.

**A. The violation of the treaty of extradition by agents of the United States deprived the trial court of jurisdiction to proceed against petitioner.**

The allegations of petitioner's motion for a hearing make it quite clear that petitioner's seizure and abduction from Mexican soil was the result of a plan initiated, organized and supervised by agents of the United States. Thus, on the day of the kidnapping, a United States agent sought to establish the location of the apartment in which petitioner resided, on the pretext that he was sought by the United States for kidnapping a child (A. 28-29). Individuals who identified themselves as United States agents searched the premises where petitioner resided (A. 29). They admitted that they were the same persons who had forcibly seized petitioner and his family (A. 29). Personal effects found in petitioner's apartment were lodged with the United States Embassy in Mexico City (A. 30). Mexican nationals who knew petitioner were interrogated by FBI agents and one of them, on at least one occasion, was questioned at the United States Embassy itself (A. 30). Further dispelling the notion that the affair was a bit of spontaneous derring-do by Mexican police officers is the fact that petitioner's abductors were met on the Mexican side of the border by an FBI agent who stated that he had been waiting for the kidnapping party for several hours (A. 32).

The activities of agents of the FBI on Mexican soil and the role of the United States Embassy put beyond question the fact that we are dealing with an action of the United States. Nor is official responsibility diminished by the fact that some of the individuals participating in what was essentially one continuous act were not themselves FBI agents. The Government is bound by the conduct of those acting on behalf of the FBI. *Byars* v. *United States*, 273 U. S. 28.

The actions of the agents of the United States obviously did not conform to the procedural requirements set forth in Article VIII of the treaty (Appendix I, p. 4a, *infra*). The treaty further provides in Article VIII that Mexican law shall govern the procedures testing the legality of the extradition demand. The Mexican legal processes embraced by the treaty were ignored as well. Nor is it difficult to conceive why self-help was substituted for the treaty. The offense for which petitioner was tried is excluded from the list of offenses in Article II for which extradition is available. And added to this is the bar imposed by Articles III and VII of the treaty affirmatively denying extradition for any "political crime or offense" or "on account of any act connected with such a political crime or offense."*

Under these circumstances, the only alternative available to our Government was to seek the consent of the Mexican Government to a procedure for obtaining custody of petitioner. But that was not done here, although it

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*The trial court admitted evidence as to alleged membership in the Communist Party as proof of motivation (e.g., R. 964-1024, 1558, 1601-1603, 1612-1615). It is not without irony that the United States Government has always insisted upon the exemption of political offenses in extradition treaties. See *Factor* v. *Laubenheimer*, 290 U. S. 276, 299:

> "President Tyler, in his message transmitting the Treaty of 1842 to the Senate for consideration, referred to article 10 as 'carefully confined to such offenses as all mankind agreed to regard as heinous and as destructive to the security of life and property. In this careful and specific enumeration of crimes, the object has been to exclude all political offenses, or criminal charges, arising from wars or intestine commotions.' Executive Documents, vol. 1, 1842-43, Doc. No. 2, p. 22."

is historically and currently * the accepted (and only) way to proceed in the case of a non-extraditable offense.**

By entering into a treaty of extradition with Mexico, the United States circumscribed its national power to proceed judicially against persons accused of crime in this country who are found on Mexical soil. Consequently, when agents of the United States violated the provisions of the treaty, the domestic courts of the United States lost judicial power to proceed. This absence of judicial power does not rest upon the illegal kidnapping of petitioner as such, but rather upon the violation of the treaty which limits the power of the United States to proceed against alleged fugitives found in Mexican territory.

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* Only recently our Government has recognized in the cases of two American nationals indicted for espionage and resident in France that the extradition treaty with that country bars extradition. Consequently, consent to their return is being sought from France. See *New York Times*, July 9, 10 and 11, 1957.

** The legal obligation to seek consent rather than to employ self-help in a *sine qua non* of our diplomacy. As a Secretary of State once wrote:

> "* * * to interpret an extradition treaty, which under our Constitution is a supreme law of the land, in a way that does violence to its obvious meaning and our consistent contention as to its meaning, so as to produce the precise situation which the treaty was designed to meet and correct, can not be justified."
>
> Secretary of State Knox, December 9, 1910, *Papers relating to the Foreign Relations of the United States*, 1910, p. 657.

And, where, as here, the treaty parties share a common border, a meticulous regard for the claims of sovereignty becomes a touchstone of good faith with respect to all dealings between the two countries.

Since the power of the sovereign essentially is territorial,* attempts to exercise that power extraterritorially, in violation of treaty obligations, are void *ab initio*.

This principle was enunciated by the Court in *Cook* v. *United States*, 288 U. S. 102, which involved the seizure by United States agents of a ship of British registry, the *Mazel Tov*, while it was cruising some eleven and a half miles off our coast with a cargo of unmanifested liquor. A penalty was assessed against the master, and ship and cargo libelled, upon the charge of hovering for smuggling purposes in violation of the Custom Law (Section 581 of the Tariff Act of 1930). This was a federal offense admittedly cognizable by the district court, and the cargo, the vessel and its master were actually brought within reach of that court's process.

After answering to the merits, the respondent objected that the seizure which initiated the proceedings was not in conformity with the treaty of 1924 between the United States and Great Britain (43 Stat. 1761). That treaty granted to the United States authority to board and search ships of British registry beyond the territorial waters of the United States, but not at a greater distance from the United States coast than they could travel in one hour. The maximum speed of the vessel in the *Cook* case was ten miles per hour. However, it was seized eleven and a half miles off the coast. Accordingly, the respondent argued that the court lacked national jurisdiction as a result of the extraterritorial action in violation of the binding treaty.

In response to this contention, the Government urged that (1) the illegal seizure was immaterial since the court

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*See *Rose* v. *Himely*, 4 Cranch. 241, 279; *Reid* v. *Covert*, — U. S. —, 77 S. Ct. 1222; 1 Beale, *Treatise on the Conflict of Laws*, Section 56.1, p. 306; Rafuse, *The Extradition of Nationals* (1939), p. 142; Hawley, *The Law and Practice of International Extradition* (1893), p. 1; 1 Moore, *Extradition*, Section 158, p. 281.

had both "subject-matter" and "personal" jurisdiction over the master, ship and cargo, (2) the judicial proceedings initiated by the United States served to validate and ratify the prior acts of its agents, if wrongful, and (3) in any event, the answer to the merits waived any objections to jurisdiction. Mr. Justice Brandeis characterized these arguments as "misconceptions."

In an analysis which applies directly to the treaty violation here, Mr. Justice Brandeis wrote for the Court, 288 U. S. at 120-122:

> "As the *Mazel Tov* was seized without warrant of law, the libels were properly dismissed. The government contends that the alleged illegality of the seizure is immaterial. It argues that the facts proved show a violation of our law for which the penalty of forfeiture is prescribed; that the United States may, by filing a libel for forfeiture, ratify what otherwise would have been an illegal seizure; that the seized vessel having been brought into the port of Providence, the federal court * * * acquired jurisdiction; and that, moreover, the claimant by answering to the merits waived any right to object to enforcement of the penalties. The argument rests upon misconceptions.
>
> "It is true that where the United States, having possession of property, files a libel to enforce a forfeiture resulting from a violation of its laws, the fact that the possession was acquired by a wrongful act is immaterial. Dodge v. United States, 272 U. S. 530, 532 * * *. Compare Ker v. Illinois, 119 U. S. 436. * * * The doctrine is not applicable here. The objection to the seizure is not that it was wrongful merely because made by one upon whom the government had not conferred authority to seize at the place where the seizure was made. The objection is that the government itself lacked power to seize, since by the treaty it had imposed a territorial limitation upon its own authority. * * * Our government, lacking power to seize, lacked power, because of the treaty, to subject the vessel to our

> laws. To hold that adjudication may follow a wrongful seizure would go far to nullify the purpose and effect of the treaty. Compare United States v. Rauscher, 119 U. S. 407 • • • ."

This case is wholly governed by *Cook*. In *Cook*, the treaty with Great Britain limited the jurisdiction of the United States to search and seize vessels of British registry to specified distances and particular purposes. Here, the treaty of extradition with Mexico limits the jurisdiction of the United States to recover and proceed against alleged fugitives to enumerated crimes and specific procedures. In *Cook*, United States agents seized the master, vessel and cargo beyond the limits permitted by treaty. Here, United States agents, disregarding the treaty, arranged and participated in the extraterritorial seizure and removal of petitioner for an alleged crime excluded by treaty. In *Cook*, the British Government did not consent to the treaty violation. Here, there was no consent by the Government of Mexico.

The Court's decision in *Cook* relies heavily on *United States* v. *Rauscher*, 119 U. S. 407, which similarly held that no valid adjudication may rest upon an assertion of national power in violation of applicable treaty provisions. The treaty in *Rauscher* was an extradition compact with Great Britain. Like the treaty here, it limited proceedings against alleged fugitives to specifically enumerated crimes and required adherence to particular procedures. While complying with the treaty requirements in obtaining Rauscher's removal to face a murder charge, the United States proceeded to prosecute him for the crime of inflicting cruel and unusual punishment, an offense not specified in the treaty.

Rauscher complained that this departure from the treaty nullified the proceedings. The Government insisted that Rauscher's presence before the trial court upon an

offense substantively cognizable by the court was sufficient to establish both personal and subject-matter jurisdiction, even if there had been some technical treaty violation. Accordingly, this Court faced the issue whether disregard of a treaty prerequisite affected the fundamental power to proceed, or whether it was merely an impropriety in apprehending the defendant, waived when the court had personal and subject-matter jurisdiction.

The Court held that it was a question of fundamental power. For, absent the treaty (or equivalent mutual agreement between the two nations), the United States possessed no power to remove and proceed criminally against alleged fugitives located in another land.

Since the fundamental power to obtain possession of fugitives originates in the treaty, the Court explained, national power to proceed depended upon full treaty compliance. This, the Court pointed out, is "not only apparent from the general principle that the specific enumeration of certain matters and things implies the exclusion of all others, but the entire face of the treaty, including the processes by which it is to be carried into effect, confirms this view of the subject." 119 U. S. at 421.*

If in *Rauscher* it was "impossible to conceive" (at 422) of the exercise of criminal jurisdiction by the United States against the defendant because of the violation of the treaty of extradition with Great Britain, then it is equally "impossible to conceive" of the exercise of jurisdiction by the United States against petitioner as a result of its total breach of the treaty of extradition with Mexico.

The district court sought to minimize the applicability of *Rauscher* by characterizing the decision of the Court as

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* See also, the cases and authorities discussed in *United States* v. *Mulligan*, 74 F. 2d 220, 221 (C. A. 2), 4 Hackworth, *Digest of International Law*, Section 306, pp. 11-12, 1 Moore, *Extradition*, Section 16, p. 21, and Fenwick, *International Law* (1934), p. 237.

merely an exception to the general rule relating to prior wrongful seizure in a criminal case. But this characterization misstates *Rauscher*. There was no wrongful seizure as such in *Rauscher*; the defendant there was removed from England by proper process. Nor can the case be confined to a situation in which an individual is tried for an offense other than that for which he was extradited. On the contrary, the Court in *Rauscher* speaks of the force of all treaty provisions. It holds that the "provisions are obligatory" and that a fugitive "can only be taken under a very limited form of procedure."

**B. The treaty creates an exclusive means of obtaining custody over fugitives on Mexican soil.**

1. THE TREATY OF EXTRADITION DOES NOT SANCTION OR AUTHORIZE THE KIDNAPPING OF AN INDIVIDUAL BY AGENTS OF ONE PARTY FROM THE TERRITORY OF ANOTHER.

As we have already suggested, the same considerations which deprived the court of jurisdiction to try and sentence petitioner, likewise establish that the treaty provisions cannot be by-passed by resort to self-help.

The court below apparently accepted the view that a violation of the treaty would have deprived the United States of jurisdiction to proceed against petitioner, conceding that it "must inquire, therefore, whether there has been a violation of the treaty with Mexico" (Appendix II to companion petition, p. 10a). The court, nevertheless, ruled that petitioner's allegations do not show a violation of the governing treaty on the ground that no extradition treaty, including the treaty with Mexico, "in terms prohibits abduction by one party of criminals found in the territory of the other." (Appendix II to companion petition, p. 11a.)

If the Mexican Government secretly arranged to have a Mexican national, residing in the United States, kidnapped

and spirited across the border, without the knowledge and approval of the United States Government, would anyone seriously contend that this abduction from the territory of the United States was an act within the terms of the extradition treaty? The answer is found, if one must search at all, in our own diplomatic history. Our Government has unequivocally taken the position that the treaty of extradition with Mexico prohibits the forcible abduction by one party of criminals found in the territory of the other.

Thus, Secretary of State Blaine declared:

> "The treaty of extradition between the United States and Mexico prescribes the forms for carrying it into effect, and does not authorize either party, for any cause, to deviate from those forms, or arbitrarily abduct from the territory of one party a person charged with crime for trial within the jurisdition of the other." *

Secretary of State Frelinghuysen reiterated this position on behalf of the United States:

> "The treaty between the United States and Mexico creates an obligation on the part of the respective governments * * * and where the obligation ceases the power falls. * * * It would be a great evil that those guilty of high crime, whether American citizens or not, should go unpunished; but even that result could not justify an usurpation of power." **.

These statements reflect the consistent interpretation by the United States Government of the obligations assumed under extradition treaties. Our Government has always adhered to the position that the recovery of alleged fugitives by one treaty nation from another may be accom-

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* 4 Moore, *Digest of International Law*, Section 603, p. 330.

** 1 Moore, *Extradition*, Section 135, pp. 166-168. See also 4 Hackworth, *Digest of International Law*, Section 306, pp. 11-12; Section 307, p. 15, and Section 345, p. 224, pointing out that this policy has been uniformly followed.

plished only pursuant to treaty or the consent of the other sovereign. 1 Moore, *Extradition*, Section 135, p. 167. This has been our policy from the earliest days of our diplomatic relations with other states.*

Thus the diplomatic history of the United States refutes the interpretation of the lower court. For example, on March 14, 1911, the State Department addressed a note to the Mexican Ambassador relating that two young American citizens, Lawrence F. Converse and Edward M. Blatt, had been kidnapped on American territory and conveyed across the Rio Grande to Mexican territory. On the other side of the border were Mexican soldiers, whose commanding officer appeared to be directing the kidnappers' work. The note stated that the Americans had been placed in jail at Ciudad Juarez and were being held on the charge of sedition, awaiting trial in a Mexican federal court. The matter was being further investigated, the note continued, since the kidnapping of American citizens from American territory constituted "a grave violation of the sovereignty of the United States by officials of the Mexican Government." The note concluded:

> "Should such an investigation result in clearly establishing that these two boys were actually kidnapped upon American territory and taken into Mexican territory, the Government of the United States will, as your excellency must perceive, find itself under the necessity of requesting that they be immediately returned, with appropriate explanations, to the American territory from which they were taken.

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* Thus, James Monroe, as Secretary of State, instructed our ministers to the following effect:

> "Offenders, even conspirators, cannot be pursued by one power into the territory of the other, nor are they to be delivered up by the latter, except in the compliance with treaties, or by favor." Quoted in Grooms, *International Extradition*, 15 Kentucky L. J. 30, 33-34 (1926).

> "Should it transpire in the course of the investigation that they have committed any offense which is properly extraditable under the existing treaty of extradition between the United States and Mexico, I need not assure your excellency that your Government will naturally possess the right to institute, in accordance with the treaty, regular proceedings looking to the return of these boys to Mexico for trial and punishment for the extraditable crime with which they may be charged." *

If the forcible kidnapping of an individual from the territory of the United States by agents of the Mexican Government was a violation of the treaty of extradition, then the abduction of petitioner from the territory of Mexico by agents of the United States is likewise a violation of the treaty of extradition. Any other interpretation of the treaty would destroy international obligations. From *Rauscher* to *Cook* and from *Cook* to *Girard*,** the decisions of this Court and the inferior federal courts recognize the exclusive nature of a treaty obligation. The treaty alone creates national power to maintain proceedings based upon extraterritorial action, absent the consent of the asylum sovereign.

Thus, Chief Justice Hughes commented in *Valentine v. United States ex rel. Neidecker*, 299 U. S. 5, 7, 9:

> "The question is not one of policy, but of legal authority. * * * Proceedings * * * must be authorized by law. There is no * * * discretion * * * unless that discretion is granted by law. * * *
>
> "Whatever may be the power of the Congress to provide for extradition independent of treaty, that power has not been exercised save in our relation to a foreign country or territory 'occupied by or under the control of the United States'."

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* Acting Secretary of State Wilson to the Mexican Ambassador de la Barra. *Papers relating to the Foreign Relations of the United States*, 1911, pp. 606-607. See also Appendix III, *infra*, for a collection of other episodes from our diplomatic history.

** — U. S. —, 77 S. Ct. 1409.

And in *Factor* v. *Laubenheimer*, 290 U. S. 276, this Court held (at 287):

> "* * * the principles of international law recognize no right to extradition apart from treaty. While a government may, if agreeable to its own constitution and laws, voluntarily exercise the power to surrender a fugitive from justice to the country from which he has fled * * * the legal right to demand his extradition and the correlative duty to surrender him to the demanding country exist only when created by treaty.
> "* * * To determine the nature and extent of the right we must look to the treaty which created it." *

The proposition advanced by the lower court that the treaty of extradition does not prohibit abductions by agents of one contracting party from the territory of the other is in direct conflict with the decisions of other courts of appeal and inferior federal courts.

In *Collier* v. *Vaccaro*, 51 F. 2d 17 (C. A. 4), an alleged narcotics dealer was arrested and forcibly taken from Canada to the United States through the activities of an informer working with United States narcotics agents, without resort to the extradition treaty with Canada. Judge Parker held that there was no authority for such proceedings apart from the existing treaty (at 19):

> "A person may be carried out of the country to answer for crime * * * only by the authority of the highest executive officials and in accordance with treaty provisions governing extradition."

See also *Villareal* v. *Hammond*, 74 F. 2d 503, 505 (C. A. 5).

One of the most vivid expressions of this principle is found in *Ex Parte Coy*, 32 Fed. 911 (D. C. Tex.). Dealing with a claim of impropriety in a removal from Mexico to the United States, the court explained (at 917):

> "This government has entered into solemn treaty stipulations with Mexico with reference to refugees

* See also *Johnson* v. *Browne*, 205 U. S. 309.

> from justice. These stipulations are, by a declaration of the Constitution of the United States, the supreme law of the land, state constitutions and laws to the contrary notwithstanding. These stipulations this government cannot forget, nor can it justify their violation, without justly incurring the contempt of the civilized world; and yet we are seriously told that Mr. Coy has waived this binding obligation on the part of the United States, and has conceded the right of Mexico to expect the government of the United States to keep its plighted faith * * *."*

In essence the rationale of the lower court rests upon a fallacious concept of the law of nations. An extradition treaty may not be ignored at will by a signatory party. It is a compact between civilized nations which limits their sovereignty. It is exclusive in its terms and premises. As one leading authority in this field has put it:

> "* * * where a treaty has been made, giving the right and creating the obligation, it is to be assumed that the treaty was intended to cover all the cases in which, and to embrace all the conditions and terms upon which, the respective parties will either make a demand or grant a surrender. They enter into the compact for this purpose, and exhaust the purpose in the compact. The compact is the whole law for their government on the subject. * * * The treaties and laws furnish the basis of the proceedings, and are hence the test of their validity and regularity." Spear, *The Law of Extradition* (2d ed., 1884), p. 221.**

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* Criminal proceedings by the United States against alleged fugitives located in Mexico have frequently come before the state courts of Texas, which have reflected a singular sensitivity to the jurisdictional limitations imposed on the United States and Mexico by the treaty of extradition. See *Dominguez* v. *State*, 234 S. W. 79 (Ct. of Crim. Appeals of Texas); *Blandford* v. *State*, 10 Tex. App. 627 (Ct. of Appeals of Texas). See, also, *Benavidez* v. *State*, 154 S. W. 2d 260 (Ct. of Crim. Appeals of Texas), cert. den. 315 U. S. 811.

** See, also, Garcia-Mora, *International Law and Asylum as a Human Right* (1956), p. 138.

2. KER V. ILLINOIS DOES NOT JUSTIFY THE DENIAL OF RELIEF HERE.

The lower courts seek to derive support from *Ker* v. *Illinois*, 119 U. S. 436. They would read *Ker* as holding that total disregard of an existing extradition treaty by the United States is not a violation of that treaty. The Court of Appeals concluded that "the question presented is indistinguishable from that before the Supreme Court in *Ker* and * * * our decision here is controlled by that case" (Appendix II to companion petition, p. 12a).

No such broad claims can be made for this case. *Ker* cannot be extended beyond its facts so as to govern a contemporary problem of international rendition. As a study of the record will show,* in consequence of the confusion and imprecision of the legal rationales upon which the petitioner there sought relief and the respondent resisted it, neither of the parties developed the facts, in themselves highly obscure and confused, in support of legal arguments which would be relevant in a determination of the issue today. Thus, the lower court's conclusion that this case is "indistinguishable" from *Ker* is meaningless. The *Ker* case, as this Court recently said of *In re Ross*, "is one of those cases that cannot be understood except in its peculiar setting." *Reid* v. *Covert*, *supra*.

The defendant in *Ker* complained only because his abduction from Peru and subsequent trial in the state courts of Illinois for an offense under state law violated his right to due process of law, in that it interfered with a personal right to asylum in Peru. This Court held that Ker had no absolute right to asylum in Peru since personal asylum yields to governmental power in three ways: (1) expulsion by the asylum state; (2) assent by the asylum state to the surrender of the fugitive; or (3) action in conformity with a treaty of extradition. The mere kidnapping itself did not result, so the Court reasoned,

* And see the state court opinion, *Ker* v. *People*, 110 Ill. 627.

in a violation of Ker's right to due process of law. This is the crux of *Ker*. It involved solely an issue of due process in a state case against a background of an extraterritorial kidnapping from a country which had only *de jure* existence and whose *de facto* authorities had assented to and collaborated in the removal.

The kidnapping of Ker did not result in a violation of the treaty of extradition because no treaty was then in force. At the time of the kidnapping, Peru was under military occupation by Chile and, as the Attorney General of the State of Illinois took pains to point out to this Court:

> "At this time, a state of things existed in Peru which rendered the treaty between the United States and that government inoperative. There was no Peru."*

But more than this, the duly constituted governing authority, the Chilean military occupation force, cooperated fully in the seizure of Ker and in effect expelled him from its territory. This the Attorney General of Illinois also emphasized to the Court, pointing out that the military governor, General Lynch, dispatched an officer to assist in the expulsion of Ker. See Appendix II, *infra*. It is of course elementary that a sovereign state or its duly constituted authority has the plenary power to expel an individual from its borders. Such an expulsion naturally would not have violated an extradition treaty even if it had been in effect.

The only issue left for the Court, then, was whether the kidnapping of Ker, absent a violation of the treaty of extradition, was in itself a deprivation of due process of law. And it was in response to this contention that the Court held that in reviewing state criminal proceed-

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* We attach as Appendix II to this petition excerpts from the Brief for the Defendant in Error in *Ker* v. *Illinois*.

ings the due process clause of the Fourteenth Amendment could not be construed to protect a defendant from prior wrongful seizure as such.

In respect to this conclusion *Ker* has no applicability here. The present case does not involve review of a state criminal proceeding. The petitioner here does not raise the issue that his abduction *per se* is sufficient to void his conviction. The present case involves a violation of an extradition treaty. The treaty with Mexico was in full force and effect at the time of petitioner's kidnapping. The Government of Mexico in no way participated in or consented to his seizure. He was not expelled or deported from its territory. And he was kidnapped under the direction and at the instigation of agents and officers of the United States itself. Hence *Cook* and *Rauscher* govern this case.

We do not quarrel with the holding of the Court in *Ker* that an asylum country may expel, assent to removal or proceed under the treaty to surrender a fugitive on demand. Of course, Mexico could have expelled petitioner or consented to his removal. Such action would not have been in violation of treaty. But Mexico did not expel petitioner or consent to his removal. The United States, without regard for the requirements of the treaty or the sovereignty of Mexico, seized petitioner on Mexican territory.

We do not believe that this Court will read *Ker* to sanction disregard by representatives of this country for the sovereignty of a sister nation. But, if this is the meaning of *Ker*, then we are confident that the Court, conscious of its obligation to preserve our good name in the community of nations, will not hesitate to review and, if necessary, repudiate an outmoded holding. See Fairman, *Ker v.*

*Illinois Revisited*, 47 Am. J. Int. Law 678 (1953).* In any event, as the Court recently said concerning the *Ross* case, "at best [it] should be left as a relic from a different era." *Reid* v. *Covert*, *supra*.**

3. THE RELIANCE OF THE DISTRICT COURT ON CASES INVOLVING INTERNATIONAL REMOVAL ABSENT TREATIES OF EXTRADITION OR PURSUANT TO AD HOC AGREEMENT IS UNBOUND.

The district court relies on a series of cases which are wholly inapposite, including *United States* v. *Dickson*, 73 F. Supp. 683 (D. C. N. Y.); *United States* v. *Insull*, 8 F. Supp. 310 (D. C. Ill.); *Ex parte Lopez*, 6 F. Supp. 342 (D. C. Tex.); and *United States* v. *Unverzagt*, 299 Fed. 1015 (D. C. Wash.), aff'd 5 F. 2d 492 (C. A. 9), cert. den. 269 U. S. 568.

None of these cases is applicable here. Were these decisions in conflict with *Cook* v. *United States*, *supra*, they would of course yield to the ruling of this Court. But they are not. In these cases the United States had jurisdiction to proceed consistent with the *Cook*

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* We find it difficult to believe that the Court's reference to *Ker* in *Frisbie* v. *Collins*, 342 U. S. 519, meant to save a principle of law which would sanction the unilateral violation of an extradition treaty by agents of the United States. When Mr. Justice Black restated the rule of *Ker* in *Frisbie* he confined himself to the proposition that a forcible abduction *per se* does not impair the power of a court to try a person for crime. He did not write that *Ker* stands for the proposition that the United States may unilaterally violate an extradition treaty and arrange the kidnapping of an individual from the territory of another sovereign.

** Only recently the Government had the occasion to comment in this Court that certain legal theories advanced in this country in the past "smacked of colonialism and an effort to revive the extraterritoriality of another century." Brief for petitioners in *Wilson* v. *Girard*, *supra*, p. 32.

holding because there were no treaties;* special lawful authority existed; the specific agreement or consent of the duly constituted foreign government was obtained;** or the United States had not participated in the unlawful extra-territorial action.†

4. THE RELIANCE OF THE DISTRICT COURT ON CASES INVOLVING INTERSTATE ABDUCTION AND RENDITION IS UNFOUND.

The district court relied heavily on decisions of this Court in cases involving interstate abduction and rendition.‡ But it ignored the warning of this Court in *Lascelles* v. *Georgia*, 148 U. S. 537 at 546:

> "To apply the rule of international or foreign extradition, as announced in United States v. Rauscher * * * to interstate rendition, involves the confusion of two essentially different things which rest upon entirely different principles. In the former, the extradition depends upon treaty contract or stipulation * * *. In the matter of interstate rendition,

* Thus, the *Diron* case involved a prosecution for manslaughter and assault allegedly committed by a crew member on board a United States merchant vessel on the high seas. Neither a treaty nor the principle of territorial limits on national jurisdiction applied. Cf. *Gillars* v. *United States*, 182 F. 2d 962 (App. D. C.), and *Chandler* v. *United States*, 171 F. 2d 921 (C. A. 1), cert. den. 336 U. S. 918, which likewise do not involve treaty violations. The *Unzeuge* case involved only a removal proceeding from one Federal district to another.

** In *Jurnll*, the defendant was removed by duly constituted Turkish authorities without participation by agents of the United States. Moreover, there was no applicable treaty then in force. 8 F. Supp. at 311.

† In *Lopez*, the district court stressed the fact that there was no participation by agents of the United States in the extraterritorial action.

‡ See, for example, the reliance upon *In re Johnson*, 167 U. S. 120; *Pettibone* v. *Nichols*, 203 U. S. 192; *Mahon* v. *Justice*, 127 U. S. 700, and *Frisbie* v. *Collins*, 342 U. S. 519.

> however, there is the binding force and obligation, not of contract, but of the supreme law of the land, which imposes no conditions or limitations upon the jurisdiction and authority of the state to which the the fugitive is returned."

The considerations which require the enforcement of international extradition treaties are not present in the relationship between states of the Union. In the treaty cases, this Court has pointed out that what is involved are the rights and duties of sovereigns. These factors have no play in the relations between states of the Union. In cases dealing with interstate rendition, the central consideration is the overriding power of the supreme law of the land, which, as this Court has put it, "imposes no conditions or limitations upon the jurisdiction and authority of the state to which the fugitive is returned."

For, as this Court pointed out in *Lascelles*, at 542 and 545-546:

> "* * * the fallacy of the argument lies in the assumption that the states of the Union occupy towards each other, in respect to fugitives from justice, the relation of foreign nations, in the same sense in which the general government stands towards independent sovereignties on that subject. * * * The case of United States v. Rauscher * * * has no application * * * because it proceeded upon a * * * treaty between the United States and Great Britain * * *."

It is for this reason that the emphasis placed by the courts below on *Frisbie* v. *Collins*, *supra*, is totally misplaced. *Frisbie* involved interstate abduction. It does not deal with the present question of treaty limitation. To deny this petitioner a hearing on the authority of *Frisbie*, "involves the confusion of two essentially different things which rest upon entirely different principles." *Lascelles* v. *Georgia*, *supra*.

**II. Petitioner's challenge to the total jurisdiction of the trial court has neither been waived nor previously litigated.**

**A. There has been no waiver.**

If our contention is sound with respect to the jurisdictional consequences flowing from a treaty violation, then no claim of waiver could serve as a barrier to relief. See McNair, *The Law of Treaties* (1938), p. 334, and Garcia-Mora, *International Law and Asylum as a Human Right* (1956), pp. 132-133. But the district court, resorting to a "jurisprudence of labels," misconceived the nature of the treaty and the theory of territorial sovereignty in which it is rooted by characterizing the consequences of a treaty violation as a matter of "personal jurisdiction," which was waived by failure to raise the issue in timely fashion.

The district court thus ruled that petitioner was not protected by *Rauscher* because that case involved "personal jurisdiction." But *Rauscher* cannot be read as limiting the juridical consequences of a treaty violation to a matter of "personal jurisdiction" waived by failure to raise it prior to trial. *Rauscher* came before the Court on a certificate of division of opinion after verdict of guilty and before judgment, on a motion in arrest of judgment. The defendant stood before the trial court under proper judicial process. No issue of personal jurisdiction presented itself for decision. The question was whether the Government could proceed in conflict with treaty provisions, assuming proper personal process and jurisdiction over the subject matter.

In *Cook*, it was contended that respondent's answer to the merits waived the jurisdictional objection. Distinguishing some of the older cases involving extraterritorial actions in the absence of treaties, Mr. Justice Brandeis rejected this contention (288 U. S. at 122):

> "In those cases it was held that the illegality of the seizures did not affect the venue of the action or the process of the court. Here, the objection is more fundamental. It is to the jurisdiction of the United States. The objection is not * * * lost by the entry of an answer to the merits. The ordinary incidents of possession of the vessel and the cargo yield to the international agreement."

See also *United States* v. *Ferris*, 19 F. 2d 925 (D. C. Cal.).*

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* The district court sought to avoid the impact of *Cook* by commenting that this case is not "even remotely similar to that of the British ship seized in *Cook*" (A. 213), since "jurisdiction over a 'person' was not involved" and "the sole question was the court's power over the specific vessel" (A. 208). If the district court is making a distinction between *things* and *persons* as they relate to the jurisdictional issue, its analysis is purely mechanical and untenable. See Walter Wheeler Cook, *Jurisdiction of Sovereign States*, 31 Columbia L. R. 368, 381 (1931). Moreover, in *Cook* the penalty was assessed against the master of the ship, the vessel and cargo having been libelled in aid of this assessment. See 288 U. S. at 168.

Likewise, the district court's classification of *Johnson* v. *Browne*, 205 U. S. 309, *Cosgrove* v. *Winney*, 174 U. S. 64, *United States* v. *Mulligan*, 74 F. 2d 220 (C. A. 2), and *United States* v. *Ferris*, 19 F. 2d 925 (D. C. Cal.), as "personal jurisdiction" decisions is misleading. In each case, the substance of the treaty issue was placed in terms of taint to the whole proceeding.

If the entire proceeding in each of these cases was so fundamentally tainted, the court could not, of course, exercise its jurisdiction over the person of the defendant. Accordingly, when the various defendants preliminarily raised the treaty objection, the courts did not have to decide whether the objections would have been available at later stages in the proceedings. The fact that relief is granted in the posture of a preliminary objection does not restrict the operative effect of the substance of the objection to that posture. This is sharply illustrated in *Cook* where there had been an answer to the merits. Only then did this Court have to decide whether the treaty objection was such that it contained basic jurisdictional questions which could be raised after waiver of "personal" jurisdiction.

Finally, the district court is wholly in error in saying that "in the case of *Ford* v. *United States*, 273 U. S. 593 (1927)—a case on all fours with *Cook*—petitioners were denied relief because the juris-

The *Cook* case establishes quite clearly that the underlying principle of *Rauscher* is that violation of a treaty results in a total failure of all national and hence judicial power.*

**B. The issue was not previously litigated.**

While both lower courts attempt to meet the jurisdictional argument directly, they also suggest that the issue is foreclosed in some manner by prior litigation. This suggestion rests upon the fact that after the verdict, but prior to sentence, petitioner made a motion in arrest of judgment challenging the jurisdiction of the court over his person. The Court of Appeals held that this motion raised issues of personal jurisdiction only and since it was not timely made, could not be considered by the court.

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dictional question had not been raised on time" (A. 208). There was no such jurisdictional issue in *Ford*, because there was no extra-territorial action or seizure in violation of the treaty. The seizures in *Ford* were made strictly in accordance with treaty. 273 U. S. at 603, 605. See, also, Harvard Research in International Law, *Apprehension in Violation of International Law*, 29 Am. J. Int. Law, Supplement (1935), at p. 625.

* The commentators agree that the *Rauscher* ruling, as applied in the *Cook* decision, nullifies proceedings in disregard of treaty because of a fundamental jurisdictional defect. And they approve of this principle strongly. Indeed, substantial authority would apply the principle unhesitatingly to violations of general international law, as well as to violations of a specific treaty. Garcia-Mora, *International Law and Asylum as a Human Right* (1956), observes (at p. 135) that removal of fugitives in violation of treaty renders "the proceedings held against such fugitives by the capturing state * * * null and void *ab initio* * * *." See also, Lauterpacht, *Recognition in International Law* (1947), p. 420 and p. 425, and Harvard Research in International Law, *Apprehension in Violation of International Law*, 29 Am. J. Int. Law, Supplement, July, 1935.

Professor Dickinson writes, *Jurisdiction Following Seizure or Arrest in Violation of International Law*, 27 Am. J. Int. Law 231, 244 (1933):

> "If the person or thing which is the subject of controversy has been brought within reach of the court process by a breach of

But neither the motion in arrest of judgment nor the appeal from the denial of that motion involved the questions presented in this petition. The charge that the violation of the international treaty of extradition deprived the trial court of total jurisdiction is raised here for the first time. The operative facts upon which the treaty violation depends were not known to petitioner at the time of the original trial or appeal. The newly presented facts are (1) the facts revealing that the United States Government initiated, arranged and participated in the abduction of petitioner from Mexican territory, and (2) the facts revealing that the Government of Mexico neither deported nor expelled petitioner, nor consented in any way to his seizure and removal. These are the facts which ground the charge of treaty violation. These facts were not before

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treaty or international law, the court should approve no arbitrary or face-saving distinctions. The court is an arm of the nation and its jurisdiction can rise no higher, by virtue of process served within the territory, than the jurisdiction of the nation which it represents. If there was no jurisdiction in the nation, to make the original seizure or arrest, there should be no jurisdiction in the court to subject to the nation's law. In terms of American precedents, this means that the underlying principle of *United States* v. *Rauscher* is correct * * * that the principle of the *Mavel Tov* [*Cook* v. *United States*] is unimpeachable. * * *"

Beale, *Jurisdiction of a Sovereign State*, 36 Harvard L. R. 241, 242-243 (1923), agrees that the national power fails when there is conflict with the general principles of international law:

"It cannot be doubted that all countries governed by the common law in fact accepted international law as part of the common law; and that the principles of that law which give or withhold jurisdiction are therefore principles of our common law.

* * *

"It is clear, then, that the sovereign cannot confer legal jurisdiction on his courts or his legislature when he has no such jurisdiction according to the principles of international law."

See also Brief for Petitioners, *Wilson* v. *Girard*, *supra*, p. 10.

the trial court or the original appellate court. They were never raised in this Court at any prior stage of the proceeding.

Thus, to argue that the issue of treaty violation has already been litigated is simply to disregard the allegations of the present petition. This, of course, a court may not do in a Section 2255 proceeding. *Chessman* v. *Teets, supra.* But more than this, the facts now raised revealing a treaty violation, while not known to petitioner, were known to the prosecution and withheld both from the defense and the courts. Indeed, it may be argued that the prosecution had a duty to bring these jurisdictional facts to the attention of the courts. It certainly cannot be argued that petitioner, ignorant of these facts, is precluded from now litigating them because the prosecution knew of their existence.

A reading of the opinion of the original Court of Appeals fully confirms this analysis. Since the motion in arrest of judgment and the affidavit submitted in its support showed no violation of treaty, the only legal issue posed was whether the personal rights of the defendant to be immune from arbitrary seizure were violated in such a manner as to negate the court's jurisdiction over his person.* This question is analogous to problems raised by an arrest without a warrant. See, for example, *United States* v. *Coplon,* 185 F. 2d 629 (C. A. 2). Such a question does not challenge the competency of the court to hear the controversy.

The careful opinion of Judge Frank makes it clear that as far as the original Court of Appeals was concerned the only question raised by the facts then before the court related to the impact of a violation of personal rights upon

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* As Judge Frank pointed out (195 F. 2d at 603, footnote 20), petitioner's contention at that stage rested upon his assertion of "his right to be free from unlawful molestation or assault by his own Government; and his right not to be convicted by an 'admission' wrested from him by a violent act."

jurisdiction over the person. No issue of treaty violation was before the court.* To urge now that petitioner is foreclosed from litigating this issue would disregard logic and governing rules of law.**

## III. The importance of the questions presented.

This Court has always construed treaties as binding compacts to be scrupulously observed by this country and its courts.† But the lower courts in this case construed the treaty so as to rob it of its bilateral character and to undermine its very purpose. This petition brings to the Court the fundamental question whether one party to an international compact may unilaterally disregard and violate its obligations at will. The case thus involves not only petitioner's right to a hearing but vital national interests. Indeed, our very standing in the community of nations

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* Perhaps the most striking support for this analysis comes from the Government itself. Petitioner in his original brief on appeal cited *Cook* v. *United States, supra,* in support of his contention that his motion in arrest of judgment was timely. The Government responded (brief to the Court of Appeals, p. 36) that the rationale and holding in *Cook* did not apply to the issues raised in the motion in arrest of judgment because in *Cook* it was a violation of an international treaty which created a defect "relating to jurisdiction over the subject matter, not merely of the person of the master." Hence the Government concluded and so urged upon the original Court of Appeals that the *only* issue presented by the facts raised in the motion in arrest of judgment was one of personal jurisdiction.

** The comment of the district court that "a court is duty bound to raise the question of jurisdiction over the subject matter on its own motion" (A. 207), does not foreclose consideration of the jurisdictional issue raised by the petition. *Kalb* v. *Feuerstein,* 308 U. S. 433; see Boskey and Braucher, *Jurisdiction and Collateral Attack,* 40 Columbia L. R. 1006 (1940).

† Comment, *Treaties and the Supreme Court,* 1 University of Chicago L. R. 602, 617 (1934); Tennant, *The Judicial Process of Treaty Interpretation in the United States Supreme Court,* 30 Michigan L. R. 1016, 1019-1020 (1932).

depends upon our adherence to treaties. Because there is involved in the case the meaning of a treaty, the obligation of the nation as a whole in its dealings with another sovereign, it is peculiarly necessary that review be granted.

All of the questions presented here really frame a single issue: The consequences which flow from the exercise of extraterritorial power in violation of an extradition treaty. This is an issue concerning which this Court rather than the lower courts should speak the final word. And this is particularly so because of the impact of the entire problem upon our foreign relations.

Finally, review is imperative to determine the scope and current applicability of *Ker* in the light of *Cook*.

## CONCLUSION

**The petition for writ of certiorari should be granted and the order of the lower court should be reversed with directions to grant petitioner a hearing.**

Respectfully submitted,

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# APPENDIX I

## Excerpts from the Treaty of Extradition of 1899 between the United States and Mexico, and from the Law on Extradition and Constitution of Mexico.

### A. The Treaty of Extradition

ARTICLE II

Persons shall be delivered up, according to the provisions of this convention, who shall have been charged with, or convicted of, any of the following crimes or offenses:

1. Murder, comprehending the crimes known as parricide, assassination, poisoning and infanticide.

2. Rape.

3. Bigamy.

4. Arson.

5. Crimes committed at sea:

(a) Piracy, as commonly known and defined by the laws of nations.

(b) Destruction or loss of a vessel, caused intentionally; or conspiracy and attempt to bring about such destruction or loss, when committed by any person or persons on board of said vessel on the high seas.

(c) Mutiny or conspiracy by two or more members of the crew or other persons on board of a vessel on the high seas, for the purpose of rebelling against the authority of the captain or commander of such vessel, or by fraud, or by violence, taking possession of such vessel.

6. Burglary, defined to be the act of breaking and entering into the house of another in the night time, with intent to commit a felony therein.

*Appendix I*

7. The act of breaking into and entering public offices, or the offices of banks, banking houses, savings banks, trust companies, or insurance companies, with intent to commit theft therein, and also the thefts resulting from such acts.

8. Robbery, defined to be the felonious and forcible taking from the person of another of goods or money, by violence or by putting the person in fear.

9. Forgery or the utterance of forged papers.

10. The forgery, or falsification of the official acts of the Government or public authority, including courts of justice, or the utterance or fraudulent use of any of the same.

11. The fabrication of counterfeit money, whether coin or paper, counterfeit titles or coupons of public debt, bank notes, or other instruments of public credit; of counterfeit seals, stamps, dies, and marks of State or public administration, and the utterance, circulation, or fraudulent use of any of the abovementioned objects.

12. The introduction of instruments for the fabrication of counterfeit coin or bank notes or other paper current as money.

13. Embezzlement or criminal malversation of public funds committed within the jurisdiction of either party by public officers or depositories.

14. Embezzlement of funds of a bank of deposit or savings bank, or trust company chartered under Federal or State laws.

15. Embezzlement by any person or persons hired or salaried, to the detriment of their employers, when the crime is subject to punishment by the laws of the place where it was committed.

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16. Kidnapping of minors or adults, defined to be the abduction or detention of a person or persons in order to exact money from them or from their families, or for any other unlawful end.

17. Mayhem and any other willful mutilation causing disability or death.

18. The malicious and unlawful destruction or attempted destruction of railways, trains, bridges, vehicles, vessels, and other means of travel or of public edifices and private dwellings, when the act committed shall endanger human life.

19. Obtaining by threats of injury, or by false devices, money, valuables or other personal property, and the purchase of the same with the knowledge that they have been so obtained, when such crimes or offenses are punishable by imprisonment or other corporal punishment by the laws of both countries.

20. Larceny, defined to be the theft of effects, personal property, horses, cattle, or live stock, or money of the value of twenty-five dollars or more, or receiving stolen property, of that value, knowing it to be stolen.

21. Extradition shall also be granted for the attempt to commit any of the crimes and offenses above enumerated, when such attempt is punishable as a felony by the laws of both contracting parties.

[The 1902, 1925 and 1939 supplements to the Treaty added the offenses of bribery, smuggling, and crimes involving narcotics and injurious substances.]

ARTICLE III

Extradition shall not take place in any of the following cases:

*Appendix I*

2. When a crime or offense charged shall be of a purely political character.

• • • •

ARTICLE VII

A person who has been surrendered on account of one of the crimes or offenses mentioned in article 2 shall in no case be prosecuted and punished in the country in which his or her extradition has been granted, on account of a political crime or offense committed by him or her previous to his or her extradition, or on account of an act connected with such a political crime or offense, unless he or she has been at liberty to leave the country for one month after having been tried, and, in case of condemnation, for one month after having suffered his or her punishment, or having been pardoned.

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ARTICLE VIII

Requisitions for the surrender of fugitives from justice, under the present convention, shall be made by the respective diplomatic agents of the contracting parties, or, in the event of the absence of these from the country or from its seat of government, they may be made by superior consular officers.

If a person whose extradition is asked for shall have been convicted of a crime or offense, a copy of the sentence of the court in which he was convicted, authenticated under its seal, with attestation of the official character of the Judge by the proper executive authority, and of the latter by the minister or consul of the respective contracting party, shall accompany the requisition.

When, however, the fugitive shall have been merely charged with a crime or offense, a similarly authenticated

and attested copy of the warrant for his arrest in the country where the crime or offense is charged to have been committed, and of the depositions upon which such warrant may have been issued, must accompany the requisition as aforesaid.

Whenever, in the schedule of crimes and offenses of article 2nd, it is provided that surrender shall depend on the fact of the crime or offense charged being punishable by imprisonment or other corporal punishment according to the laws of both contracting parties, the party making the demand for extradition shall furnish, in addition to the documents above stipulated, an authenticated copy of the law of the demanding country defining the crime or offense, and prescribing a penalty therefor.

The formalities being fulfilled, the proper executive authority of the United States of America, or of the United Mexican States, as the case may be, shall then cause the apprehension of the fugitive, in order that he or she may be brought before the proper judicial authority for examination. If it should then be decided that, according to the law and the evidence, the extradition is due pursuant to the terms of this convention, the fugitive may be given up according to the forms of law prescribed in such cases.

## Article XII

A person surrendered under this convention shall not be tried or punished in the country to which his or her extradition has been granted, nor given up to a third power, for a crime or offense not provided for by this convention and committed previous to his or her extradition, unless the consent of the surrendering government be given for such trial or such surrender to a third power.

But such consent shall not be necessary:

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(a) When the accused shall have voluntarily requested to be so tried or surrendered to a third power.

(b) When he or she shall have been free to leave the country during thirty days after discharge from custody because of the charge on which he or she was surrendered, or if convicted thereof during thirty days after having satisfied his or her penalty or having been pardoned.

**B. The Law on Extradition of Mexico**

In connection with the reception, review, and determination of requests for removal to the United States, of persons charged with the commission of crimes in the United States, the relevant Mexican laws are the Constitution of the United States of Mexico and the Law on Extradition of Mexico (Appendices A and C attached to petitioner's motion of May 8, 1956).

The Law on Extradition of Mexico provides that where treaties exist, "Extradition shall take place in the cases and form as determined by treaties." Chapter I, Article 1. Under Chapter I, Article 3, "The perpetrators of those crimes which are grounds for extradition * * * shall only be extradited in accordance with this law." Chapter II, Article 12, requires that "Extradition shall always proceed through diplomatic channels." Upon request for sequestration of papers; money or other objects in the possession of the accused, "they shall be taken and deposited under inventory by Government agents and shall be turned over to the state that seeks them if extradition be granted, or shall be returned to the detained when set free." Chapter II, Article 15.

Chapter II, Article 16 of the Law on Extradition of Mexico requires (a) proof of the *corpus delicti* and of probable guilt in such a way that "if the crime had been committed on its territory, his apprehension and judgment

could have proceeded in conformity with the laws of the Republic," and (b) production of authenticated texts of the foreign law defining crime and punishment, and a declaration that the law is in effect.

The documents and proof are then referred for judicial hearing to the judge of the district in whose jurisdiction the person is located (Chapter II, Article 17), and apprehension is accomplished through order of the district judge "to the local political authorities of the district, territories or states of the Union" (Article 19).

Upon apprehension, the accused appears before the district judge, is informed of the request, charges and documents, and may present the objections, among others, that the proceeding is contrary to treaty requirements or that it violates *personal guarantees* under the Constitution of the Republic (Article 20). Then, following proof submitted by the district attorney, and after stipulated time limits (Articles 22 and 23), the adjudication is made. If the request is granted, the person is placed in the custody of the Secretariat of Foreign Relations (Article 24).

The final decision as to removal is that of the President of Mexico: "On the basis of the judicial proceedings, the Executive of the Union shall determine whether the extradition shall be agreed to or not, being able to separate himself from the decisions of the Judge, in any case" (Article 25).

Further review of any decision granting removal may be obtained under the writ of *amparo*, pursuant to Article 102, now Article 107, of the Constitution of the United States of Mexico (Articles 27, 28 and 29).

### C. The Constitution of Mexico

Among the related provisions of the Constitution of the United States of Mexico are those which declare that

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"Every person in the United Mexican States shall enjoy the guarantees that this Constitution grants, which may neither be restricted nor suspended, except in the cases and under the conditions herein established" (Article 1); "The negotiation of treaties for the extradition of political offenders * * * shall not be authorized; nor shall conventions or treaties be made by virtue of which guarantees and rights established for the individual and the citizen by this Constitution are altered" (Article 15); and no arrest or detention may be carried out without a warrant based on a written charge, and searches must be pursuant to a warrant in writing and are exclusively limited to the terms of the warrant (Article 16).

# APPENDIX II

## Excerpt from Brief for Defendant in Error, *Ker* v. *Illinois*, pp. 19-21.

Having passed upon the law questions raised by this hearing, the Court may have interest enough in the man and the crime which these questions are put forward to shield, to read another page concerning them. In the month of January, 1883, Frederick M. Ker, having been for many years the confidential clerk for Preston, Kean & Co., bankers of Chicago, asked permission to go to New Orleans for a rest from his labors. When the time for his vacation expired, the bankers instead of *receiving* their clerk, received a letter from him, postmarked at Chicago, in which he generously informed them that there were deficits in his accounts, and the amount of embezzlement would be found to be about $21,000 of the moneys of the bank, and $35,000 of United States bonds belonging to its patrons. The letter contained an intimation that if allowed to take his journey unmolested, the bank would be let alone, but if pursued and brought back, a run would be organized and the bank ruined; and concluded with the cool remark that if successful in future life, he would endeavor to refund the money to those entitled to receive it. Preston, Kean & Co. were not alarmed by the threats, and inaugurated such measures that by the next steamer there went to Aspinwall one of Pinkerton's men, who at Panama found a Chicago overcoat which had been shed and given to a porter. Precaution had been taken to cut the tailor's name from the neck of the coat, but the name of Ker in one of the lapels of the side pocket remained untouched. Learning from the porter that the owner of the overcoat had sailed for Callao, the detective, armed with photograph alone, followed by the next steamer. Arriving there, he went to Lima, and in a few days thereafter, while in a public square, recognized Ker sitting under the shade of a tropical tree, regaling himself with a cigar. An acquaintance followed. Ker could speak French and so could the detective. Becoming interested in each other, a friendship arose. Together they did the city, the theatre and the fandango. Invest-

ments were discussed; Ker had money, the detective had more, and thus dreaming and scheming, days passed into weeks and time wore happily away. In the meantime, at Chicago, the victimized bankers obtained the proper demand from the federal Secretary of State, which came by the next steamer to the friend in Lima. At this time, a state of things existed in Peru which rendered the treaty between the United States and that government inoperative. There was no Peru. The government had a nominal existence at Ariquipa, back in the mountains, eighty-five miles from Lima, but General Lynch, of the Chilian forces, was in military occupation of the capital. Pinkerton's man had no passport to go through the lines to present our demand at the mountain camp of the Peruvian government, but did what was perhaps the next best thing, applied to General Lynch. This officer, doubtless thinking that security to criminals was not part of his mission in Peru, dispatched an officer to aid the detective in putting Ker on his way back to the United States. On board the man-of-war Essex, then in the harbor at Callao on her way to China, he was conducted to a state-room and transported to Honolulu, where it was expected to intercept the departure of a vessel to San Francisco. It happened, however, that this vessel had sailed when the Essex arrived outside the harbor, and Ker enjoyed the sea breezes on board his country's man-of-war for nearly a month, when the next steamer took him aboard for San Francisco. Having been brought to Chicago, Ker, in the course of time, was placed upon his trial. He interposed no denial of the charges and the theft and embezzlement, but relied upon his ability to persuade the United States to take him back to Peru. The court below was not susceptible to these persuasions and gave him ten years' tuition in Joliet to improve his notions of business integrity. With what success his appeal will meet here, remains to be seen.

GEO. HUNT
Attorney General
State of Illinois

# APPENDIX III

## Expressions of the Department of State in Cases of International Abduction and Violation of Extradition Treaties.

In October, 1872, the British Government protested the forcible seizure without judicial warrant and abduction to the United States, where he was arrested and imprisoned on charges of violating the Ku Klux Act, of Dr. Rufus Bratton, a United States citizen residing in Ontario, Canada. The abduction, the British note said, had been contrived and instigated by an American detective, who was assisted by a Canadian official. As the detective's conduct involved a violation of the territorial independence and sovereignty of Great Britain, it was suggested that Bratton be returned and the proceedings against him dropped. In reply, Secretary of State Fish said that the detective took no active part in the arrest and attempted to exercise no control over Bratton until he had crossed the frontier into the United States, but in other respects confirmed the statements in the British note. Mr. Fish further said:

"When the matter of Bratton's abduction was first brought to the attention of this Government * * *, prompt and immediate steps were at once taken to have him returned to the authorities and jurisdiction of Canada. I trust that I need not assure you that the Government of the United States would lend no sanction to any act of its officers or citizens involving a violation of the territorial independence or sovereignty of her Majesty's dominions."

1 Moore, *Extradition*, Section 190, pp. 283-284.

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The reverse situation is presented by another case between the United States and Britain in 1876 in which the abduction was apparently effected by a British subject with the connivance and aid of American officials. As stated in a communication from Secretary of State Fish to the

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United States Minister at London, one John Blair, who claimed to be an American citizen, a claim which the proofs did not establish, was taken from Kansas on a requisition from the governor of Illinois, obtained on the petition of a person representing himself to be a former member of Parliament and a member of an English law firm, for the surrender of Blair to the authorities of Illinois, to be tried there for perjury. However, possession of Blair's person having been obtained, he was hurried to New York, put on a steamer and taken to England. Mr. Fish asked that the case be investigated and that if the facts were found as stated, "the man be immediately set at liberty and restored to this country, and that the proper steps will be taken both to indemnify him and to punish the parties who have been guilty of an outrage on the personal rights of an individual and on the dignity of both governments." Subsequently, the American Minister reported that Blair had been tried and sentenced in England on a criminal charge. But the British Government caused him to be released, on condition of his return to the United States, and paid his travelling expenses.

*Ibid.*, Section 191, p. 285.

* * *

In another case in 1876, one Peter Martin, a naturalized citizen of the United States, after being tried and convicted of various offenses in Laketon, British Columbia, was taken by his guards through the territory of Alaska on the way to jail in Victoria, B. C. While in Alaska, Martin assaulted one of his guards, for which offense he was tried and found guilty at Victoria. In respect to the assault committed in Alaska, Secretary of State Fish took the position that Martin should be released, because this offense was committed within the jurisdiction of the United States. But, in regard to both offenses and to Martin's detention for any purpose, Mr. Fish said that if Canadian officers in transporting Martin from the place of his con-

viction to the place of his imprisonment conducted him through United States territory, "a violation of the sovereignty of the United States has been committed and the recapture and removal of the prisoner from the jurisdiction of the United States to British soil was an illegal, violent and forcible act which cannot justify the subsequent proceedings whereby he has been, is or may be restrained of his liberty." The hope was therefore expressed that Martin would be released, and on September 25, 1877, the State Department was informed that after an inquiry into the circumstances of the case, the Dominion Government had decided to free him without delay.

*Ibid.*, Section 192, pp. 285-287.

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In 1878, the Mexican Minister informed the Department of State that a Texas sheriff had visited the judicial district of Rio Grande in Mexico for the purpose of securing two persons who had committed murder in Texas. The judge of the district issued a letter requesting Mexican authorities to lend their aid. The men were apprehended by local authority in another locality and delivered to the sheriff who promised to surrender them to the judge of the Rio Grande district. Instead, he took them directly into Texas without any formality. The Mexican Minister asked for the restoration of the prisoners to Mexican jurisdiction and Secretary of State Evarts replied:

"I regret to learn that the provisions of the treaty of extradition with Mexico have been disregarded, as they appear to have been in this instance. The attention of the Governor of Texas will be called to the circumstances of the case, with a view to repairing the injury which seems to have been committed."

*Papers relating to the Foreign Relations of the United States*, 1878, p. 675.

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In 1891, the United States demanded the return to American jurisdiction, subject to such regular extradition process as the Spanish government might afterwards institute under the treaty, of one Rufino Rueda, who, on June 19, 1891, after his arrest at Key West, with a view to extradition on a charge of murder in Havana, was during the night taken by Spanish agents on board of a vessel and carried to Havana. The Spanish Government caused the prisoner to be returned to Key West.

4 Moore, *Digest of International Law* 330. See, also, Herbert W. Bowen, *Recollections Diplomatic and Undiplomatic* (New York, 1926), pp. 164-166.

* * *

In the case of the abduction from New York to Switzerland of the child Constance Madeleine His, an American citizen, by her Swiss father, Secretary of State Blaine instructed the American Minister at Berne on March 1, 1892:

"It is common practice between nations where a fugitive from justice has sought asylum in another country and has been kidnapped, whether by officers or private individuals, or has been procured in some other irregular way, and carried back to the country from which he fled, to return such a fugitive on the request of the Government whose sovereignty has been violated. If the worst criminal had fled Switzerland to this country and had been taken out of our jurisdiction and back to Switzerland in the manner in which this child has been taken, this Government can not doubt that the Swiss Government would, upon request, promptly return such a person to our jurisdiction."

On July 27, 1892, Secretary of State Foster wrote to the American Minister in relation to the same case:

"I regret that the Swiss Government does not regard those circumstances such as to require the child's return.

to the United States. Its position seems to be that however wrongfully the child was taken from this country and brought into Switzerland, since she is now there and the subject of proceedings pending in its courts, the executive authority will not interfere, but the custody of the child must abide their result. None of the proceedings referred to were begun until after the wrongful abduction of the child, which it is clearly their sole purpose to sustain. The position taken by the Federal Council permits Mr. His, in contravention of a fundamental principle of equity, to take advantage of his own wrong. Generally, too, it would permit any person to enter the territory of a friendly government and abduct or kidnap its citizens and carry them into its own country, where they must abide the result of whatever proceedings may be instituted against them or with respect to them."

The despatch continued to recite the recent action of the British Government in voluntarily returning a youth, a citizen of Canada, who had been kidnapped or enticed from the United States and tried and convicted of an offense in Canada committed there prior to his flight to the United States.

*Papers relating to the Foreign Relations of the United States*, 1894, pp. 648-650.

* * *

In answer to a note from the Mexican Department of Foreign Affairs pointing out a contravention of Article X of the extradition treaty in that the governor of Texas, outside of diplomatic channels, made a direct request on the governor of Tamaulipas for the provisional detention of a man charged with murder in Texas, which request was granted by the governor of Tamaulipas, Secretary of State Root wrote on November 2, 1905:

"The view of the Mexican foreign office that, in order to secure the provisional arrest and detention in Mexico of a fugitive criminal, it is necessary, under the provisions of Article X of the extradition treaty, to make request therefor through the diplomatic channel is correct."

Explaining the possible consequences of such a violation of the treaty, the Mexican Secretary of Foreign Affairs, Don Ignacio Mariscal, wrote to the American Chargé d'Affaires on November 28, 1905:

"* * * should it ever occur that at the time of proceeding in the irregular manner observed heretofore by the frontier authorities of both countries the recourse of amparo be interposed against an illegal act, such as the provisional detention in which the provisions of the extradition treaty have not been followed, the amparo would have to be granted, and this might cause legal difficulties against the subsequent course of the proceedings."

*Ibid.*, 1905, pp. 662-663.

A memorandum from the British Embassy on May 24, 1906, raised the imprisonment of one Arthur McIntire for a non-extraditable offense after his surrender by Great Britain. McIntire had jumped bail and fled to England after being convicted of using the United States mails to defraud. Since this offense was not extraditable, his bondsmen charged him with embezzlement, and his extradition was applied for and granted. Upon his return, he was imprisoned on the original conviction, the charge of embezzlement being dropped or dismissed.

In a reply memorandum, the State Department wrote on June 4, 1906:

"In respect to the charge of mala fides in procuring the extradition, the department hardly needs to assure the embassy of its emphatic condemnation of any and all such

subterfuges as it is alleged were practiced by the bondsmen in this case. Close scrutiny is given by the department to all applications for extradition before their presentation to a foreign government, in order to detect, wherever possible, any abuse of extradition process; but, if such abuse occurs, the remedy in a proper case would appear to be a judicial and not an executive function."

In further explanation of this affair, Acting Secretary of State Adee forwarded on September 24, 1906, to the British Ambassador a communication from the Acting Attorney-General which said that in imprisoning McIntire on a charge different from that for which he was extradited "no advantage was taken of McIntire. He was cautioned by the United States attorney that the offense of which he had been convicted in the United States court was not extraditable and that, so far as the United States was concerned, he was at liberty to return to London if he so desired."

*Ibid.*, 1906, pp. 785, 791.

* * *

In an instruction to the American consulate at Cairo, on September 24, 1909, regarding a request for the provisional arrest and detention of a fugitive in Egypt, the State Department said that it "considers it improper and not in accordance with present municipal law for American consular officers in extra-territorial countries to follow the practice of consuls of other countries by themselves apprehending and returning, by virtue of their extraterritorial powers and jurisdiction, criminals who are fugitives from justice in this country."

*Ibid.*, 1909, p. 596.

* * *

Acting on a report from the American consul at Nuevo Laredo that Samuel Cantú, former mayor of Lampasos,

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Mexico, was on January 26, 1914, enticed to the middle of the international bridge, seized on the American side of the boundary by two Mexican officers, dragged across the boundary and thrown into prison, Secretary of State Bryan on January 27, 1914, instructed the consul and the American Chargé, O'Shaughnessy, at Mexico City, to demand the immediate release of Cantú and his return to the American side of the border. On January 29, Mr. Bryan instructed Mr. O'Shaughnessy and the consul to renew the demand for Cantú's release and to "intimate that unless this demand is immediately complied with, this Government will find it necessary to consider drastic measures in the premises." Cantú was released on February 1, 1914, and brought to Laredo by the American consul.

*Ibid.*, 1914, pp. 900-903.